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No. 84-310

In The  
**Supreme Court of the United States**  
 October Term, 1984

— 0 —  
 IN THE MATTER OF ATTORNEY  
 ROBERT J. SNYDER

— 0 —  
 ON WRIT OF CERTIORARI TO THE  
 UNITED STATES COURT OF APPEALS  
 FOR THE EIGHTH CIRCUIT

— 0 —  
**PETITIONER'S BRIEF**

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## **QUESTIONS PRESENTED**

1. Whether the disciplinary procedures of the Eighth Circuit Court of Appeals can constitutionally abrogate the First Amendment Rights of Attorney Robert J. Snyder.

2. Whether the disciplinary procedures of the Eighth Circuit Court of Appeals afforded Robert J. Snyder due process of law as envisioned by the Constitution of the United States.

## PARTIES TO THE ACTION

The parties in this action are Attorney Robert J. Snyder and the United States Court of Appeals for the Eighth Circuit.

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### **OPINIONS BELOW**

The opinion of the Court of Appeals (J.A. 55-69) is reported at 734 F.2d 334 (8th Cir. 1984). This decision was a response to the Court's own Order to Show Cause why Attorney Robert J. Snyder should not be suspended from practice in the Federal courts.

The second opinion of the Court of Appeals (J.A. 88-95) is reported at 734 F.2d 341 (8th Cir. 1984). The second decision was in response to a Petition for Rehearing en banc of the original order.

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### **JURISDICTION**

The decisions of the Eighth Circuit Court of Appeals were filed April 13, 1984, and May 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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### **CONSTITUTIONAL PROVISIONS INVOLVED**

1. United States Constitution, Amendment 1 provides:

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the government for redress of grievances.

2. United States Constitution, Amendment 5 provides in pertinent part:

No person shall . . . be deprived of life, liberty, and property without due process of law. . . .

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### **STATEMENT OF THE CASE**

On October 6, 1983, Attorney Robert J. Snyder (hereinafter Snyder) wrote a letter to Helen Monteith (here-

inafter Monteith), secretary to the Honorable Bruce M. Van Sickle, Judge of the United States District Court for the District of North Dakota (hereinafter Judge Van Sickle), which letter read:

Dear Helen:

I am in receipt of the letter of September 26, 1983, from the Eighth Circuit Court of Appeals, in which our latest attempt to justify our time and expenses for Dennis Warren has again been sent back. This letter is for the purpose of responding to that letter.

In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

Thank you for your time and attention.

Very truly yours, (J.A. 14-15).

That letter was forwarded to the Eighth Circuit by Monteith and on December 22, 1983, the Eighth Circuit issued an Order to Show Cause to Snyder (J.A. 21-23). Snyder filed a Return to Order to Show Cause on January 16, 1984, (J.A. 23-31). On February 16, 1984, Snyder ap-

peared before the Eighth Circuit panel (See Transcript of Proceedings, J.A. 31-50).

At the hearing, in addition to the items which were set forth in the Order to Show Cause, discussion ensued regarding the content of Snyder's letter to Monteith and the Eighth Circuit requested that Snyder apologize for the letter. Snyder declined and the Eighth Circuit in an opinion filed April 13, 1984, (J.A. 55-69 stated):

We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter Snyder should make application to both this court and the federal district court of North Dakota to be readmitted. (J.A. 61).

A petition for rehearing en banc was filed (J.A. 70-87). The Eighth Circuit, on May 31, 1984, issued an order denying the petition for rehearing en banc (J.A. 88-95) with Judges Bright and McMillan taking the position that the petition for rehearing en banc should be granted.

A petition for certiorari was filed with this Court and granted on January 14, 1985, — U.S. — (1985).

On March 14, 1983, Judge Van Sickle, appointed Snyder as counsel for Dennis Warren in a federal criminal case filed in that court. Snyder completed the work on the case and submitted CJA Form 20 certifying the amount of work done and the dates of the work and the reimbursable expenses and requested payment of \$1,898.55 (J.A. 1). Judge Van Sickle approved payment in the amount of \$1,796.05 and forwarded the form to the administrative office of the Eighth Circuit. The form

was returned by June Boadwine by memorandum to Judge Van Sickle on September 6, 1983, requesting further information (J.A. 2).

On September 20, 1983, Snyder sent a letter to Monteith, Judge Van Sickle's secretary, and included a copy of his billing records relating to the Warren case (J.A. 3-12). The documents were sent to the Eighth Circuit and on September 26, 1983, by memorandum from June Boadwine to Judge Van Sickle, request was made for further itemization of time and out-of-pocket expenses (J.A. 13). That memorandum was forwarded to Snyder and on October 6, 1983, Snyder sent the letter to Monteith, which is quoted above (J.A. 14-15). In that letter, Snyder said, among other things, that:

Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it. (J.A. 15).

Chief Judge Donald P. Lay (hereinafter Judge Lay) on November 3, 1983, wrote to Judge Van Sickle and enclosed a copy of Snyder's letter (J.A. 15-18). In that letter, Judge Lay states:

I consider Mr. Snyder's letter to your secretary as being totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process in the courts. (J.A. 16).

Judge Lay further states:

However, when a lawyer becomes disrespectful and refuses to follow the guidelines and refuses to cooperate with the court, then it is a more significant problem.

Mr. Snyder indicates that he would like to have his name removed from the list of attorneys who will be

appointed to represent indigent criminal defendants. As far as the court is concerned, I will honor that request and I instruct you to remove his name from the list of attorneys who will be appointed in criminal cases. However, in view of the letter that Mr. Snyder forwarded, *I question whether he is worthy of practicing law in the federal courts on any matter. It is my intention to issue an order to show cause as to why he should not be suspended from practice in any federal court in this circuit for a period of one year.* Suspension, of course, will apply to his appearance in federal court in North Dakota. We will, of course, give Mr. Snyder an opportunity to respond before any final determination is made. (J.A. 17-18) (emphasis added).

Judge Lay again wrote to Judge Van Sickle on November 15, 1983, and stated:

At this point, *I feel if Mr. Snyder wishes to write the court offering his apology to the court for his disrespectful comments* and assuring the court that he will in the future be willing to comply with the requirements of the CJA and the guidelines, *I will then be willing to recommend to the court that the order to show cause not be filed* and, as a result, become public record.

Should Mr. Snyder choose not to honor this request, it will then become necessary for me to have the show cause order issued. I would appreciate your contacting Mr. Snyder in this regard. (J.A. 18-19) (emphasis added).

Judge Lay then exercised his administrative powers and cut the compensation that Snyder was to receive in the Warren case to only \$1,000 and out-of-pocket expenses in the sum of \$23.25. Judge Van Sickle responded to Judge Lay's request on December 12, 1983, and indicated that he had had several conversations with Snyder and that Snyder:

. . . sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. (J.A. 20).

Judge Lay on December 22, 1983, caused to be filed an Order to Show Cause directed to Snyder (J.A. 21-23).

The text of the Order to Show Cause clearly indicates it was directed to Snyder's request to have his name removed from the list of attorneys who represent indigent criminal defendants and his alleged refusal to comply with the guidelines for payment of attorney's fees pursuant to the Criminal Justice Act.

The Show Cause Order stated:

*In view of Mr. Snyder's refusal to carry out his obligations as a practicing lawyer and as an officer of this court, he is hereby ordered to show cause within 30 days of this order as to why he should not be suspended from practicing in the federal district court, as well as the United States Court of Appeals for the Eighth Circuit, for such period of time as his refusal to serve continues. . . .* (J.A. 22) (emphasis added).

Snyder filed a return to the order (J.A. 23-31) and in the return pointed out that the plan that was in effect in North Dakota pursuant to the Criminal Justice Act of 1964 was a voluntary plan in that it provided in pertinent part:

*The State Bar Association of North Dakota, acting by and through its appropriate committee, has recommended a list of attorneys who, in the opinion of such Bar Association, are competent to give adequate representation to parties under the act, and who are willing to serve.* (J.A. 29) (emphasis added).

Snyder pointed out in the return that his statement to Monteith in the October 6th letter was simply a demonstration of his unwillingness to continue to serve on the panel. He further pointed out that if he could be compelled to continue to represent indigent clients in federal cases, then that compulsion should be extended to all attorneys who practice within the Southwestern Division

of the District of North Dakota regardless of their willingness to serve. He further pointed out in his return that the North Dakota plan needed revision (J.A. 30).

Snyder included in his return a request for a hearing before the full court (J.A. 31); however, that request was denied and a three-judge panel consisting of Judge Lay and Judges Arnold and Heaney conducted the show cause hearing. Snyder also requested that Judge Lay recuse himself from consideration of the matter, which request was denied and on February 16, 1984, Snyder appeared before the panel in St. Paul, Minnesota. A transcript of those proceedings is contained at pages 31 through 50 of the Joint Appendix.

During the hearing, Snyder amplified on his return to the order to show cause. Judge Lay then brought up the matter of the letter of October 6, 1983, to Monteith (J.A. 33). Snyder pointed out that he had no problem with the compensation remaining as it was if the plan was equally applied and further pointed out that since 1980 of the 256 lawyers in the Southwestern Division of North Dakota, only 30 were appointed to criminal cases, 20 to drug cases, 10 to serious felonies, and only 4 or 5 to murder and rape cases (J.A. 36).

Judge Arnold later brought up the October 6 letter (J.A. 36-37) and indicated that he was "bothered by the tone of the letter" and Judge Arnold stated:

*I am asking you, sir, if you are prepared to apologize to the court for the tone of your letter.* (J.A. 40) (emphasis added).

Snyder responded:

*That is not the basis that I am being brought before the court today.* (J.A. 40) (emphasis added).

Snyder further pointed out that he had been directed to apologize previously and had declined to do so and stated:

But, I didn't apologize then and I'm not apologizing now, and by the way, that letter was not sent to the Eighth Circuit, it was sent to Helen Monteith. (J.A. 41).

Judge Arnold then stated:

All right. I just want to get this clear, that *you are declining to apologize for the letter of October 6.* (J.A. 41) (emphasis added).

Snyder responded that he was declining to apologize for the letter, but again pointed out "but that's also not the basis of this proceeding." (J.A. 41). Judge Arnold then cut in and stated:

It is the basis of another proceeding. Because you have a duty as a lawyer to behave yourself in a respectful fashion, just as the courts have a duty to try to understand the problems of bar to behave with courtesy towards members of the bar and I have to say, that I think you are failing in your duty. (J.A. 41).

There was then further discussion between the court and Snyder and Judge Lay stated:

I have given you every opportunity to simply apologize to the court and to indicate that you will continue with your criminal obligations. That is all I asked Judge Van Sickle to ask you. You refused to do that. *In the order to show cause, which is very simply and succinctly stated, I gave you every opportunity to purge—you wouldn't even have had to bother to the extents of coming down here—by simply writing to the court and saying "Yes, you would continue to serve in pro bono obligations w'en asked, and that you will continue to comply with the guidelines". That is all you have to do at any time in order to be accepted in this court on good standing.* Your refusal to do that will probably lead to your suspension, not only in this

court, but in the federal district courts. And, it seems to me, that's the road you wish to travel. And your—I just caution you, that your choosing that road yourself. (J.A. 43) (emphasis added).

Judge Lay then indicated that the inequities of the plan that Snyder pointed out in his return to the order to show cause were of concern to the court (J.A. 44) and that he was making an independent investigation of them. Snyder then pointed out that if he was to be suspended the situation in his district would become worse than it already was and that it was his opinion that "I don't think you're going to find anybody who will take a case." (J.A. 44). Judge Lay replied, "Well then, maybe they all will be suspended from practice." (J.A. 45).

Judge Lay then stated:

I will give you ten days, Mr. Snyder, *if you wish to write a letter to the court and purge yourself of the concern of the court; all it is is a simple statement that you will take pro bono assignments of the federal courts and that you will comply with the guidelines if you are asked to do so.* If you choose not to do that, then simply notify the court and then we will take it upon ourselves to so act. (J.A. 45) (emphasis added).

Judge Arnold then again directed the conversation to the letter of October 6th (J.A. 45). Judge Lay again suggested that he was confident that the plan would be revised to express that every lawyer has within his obligation a duty to render pro bono work and at the conclusion of the hearing, Judge Lay stated:

I want to make it clear to Mr. Snyder what it is the court is allowing you ten days lapse here, a period for you to consider. One is, that, *assuming there is a general requirement for all competent lawyers to do pro bono work, that you stand willing and ready*

*to perform such work and will comply with the guidelines of the statute. (J.A. 50) (emphasis added).*

Had Judge Lay stopped there, there would have been no problem because that was precisely the subject of the Order to Show Cause and Snyder had no problem agreeing to those requests or requirements. However, Judge Lay then strayed beyond the content of the order to show cause and stated:

*And secondly, to reconsider your position as Judge Arnold has requested, concerning the tone of your letter of October 6th. I think that's all we wish to hear about, and if you choose not to take any action, you are to so notify the court within ten days. (J.A. 50) (emphasis added).*

On February 22, 1984, Snyder sent a letter to the Eighth Circuit (J.A. 51-52) wherein he stated that if a new plan for the implementation of a Criminal Justice Act in the State of North Dakota was enacted, he would obey its mandates and further, he would make every good faith effort to comply with the guidelines regarding the payment of attorney's fees and expenses. That is precisely what Judge Lay had requested Snyder to do to purge himself until the final comment made by Judge Lay referring to Judge Arnold's concern regarding the tone of the letter of October 6th and a call for an apology regarding that letter. On February 24, 1984, Judge Lay acknowledged Snyder's letter and by return letter stated:

*The court expressly asked you if you would be willing to apologize for the tone of the letter and disrespect displayed. You serve as an officer of the court and as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution. Before circulating your letter of February 23, I would appreciate your response to Judge Arnold's*

*specific request, and the court's request, to apologize for the letter you wrote. (J.A. 52-53) (emphasis added).*

It is thus clear from Judge Lay's letter that the only concern that the court yet had was Snyder's failure to "apologize" for the content of the October 6, 1983, letter to Monteith. It is equally clear that the Order to Show Cause did not order Snyder to show cause why he should not be suspended from practice for refusal to apologize for the letter. Had the Order to Show Cause so directed, Snyder's response would have included appropriate references to his First Amendment rights and privileges.

On February 27, 1984, Snyder wrote to Judge Lay acknowledging receipt of Judge Lay's letter and then stated:

*I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. (J.A. 53-54).*

Thereafter on April 13, the Eighth Circuit in an opinion authored by Judge Lay (J.A. 55-69) ordered:

*We find that Robert Snyder shall be suspended from the practice of law in the Federal Courts of the Eighth Circuit for a period of six months; thereafter, Snyder should make application to both this court and the federal district court of North Dakota to be readmitted. (J.A. 61).*

An analysis of that opinion indicates that the court correctly states that Snyder was cited in the Order to Show Cause for his alleged refusal to continue to perform services in indigent cases and his alleged refusal to comply with the court's guidelines under the CJA Act. The court then points out that Snyder was requested to purge himself:

*by agreeing to accept appointment under the Act and by otherwise complying with the Act's guidelines. (J.A. 57).*

Snyder agreed to take CJA appointments and follow the guidelines in the letter to Judge Lay dated February 22, 1984 (J.A. 51-52); however, the court then goes beyond the matters contained in the Order to Show Cause and states:

*The panel also requested him to demonstrate in writing that he would be respectful in his relations with the federal courts and to offer a retraction and sincere apology for his disrespectful remarks rendered in his letter of October 6. (J.A. 57-58) (emphasis added).*

The court correctly indicates that Snyder offered his continued services under the CJA Act and then added that he:

*contumaciously refused to retract his previous remarks or apologize to the court. (J.A. 57-58).*

The court again points out in its opinion (J.A. 59) that Snyder had conditionally offered to serve in indigent cases and comply with the CJA guidelines, but the court did not find that satisfactory and stated:

*However, in a letter to the court he has otherwise refused to retract or apologize for his disrespectful remarks to the court. (J.A. 59) (emphasis added).*

The court then stated:

*We find Snyder's present statement that he will conditionally comply with the guidelines is not enough. His refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts. (J.A. 60) (emphasis added).*

It is therefore clear that the only reason the court suspended Snyder was for his continued refusal to apologize for the remarks made in the October 6th letter to Monteith. The court then refers to the necessity of a pub-

lic display of respect for the judicial branch and further indicates that respect must be shown when the courts are carrying out a judicial function. (J.A. 60). It must be pointed out, however, that the letter which is of concern to the court was not a letter made public until after the court raised an issue about it. It was a private letter directed to a secretary of a federal district judge; it was a private letter which was not released to the media or to any other institution or individual by Snyder; and finally, the only reason that it has become public is by virtue of the actions taken by the Eighth Circuit in this matter.

The court then concluded that Snyder should be suspended from practice. It is clear that the suspension relates to the content of the letter and the failure to apologize for it and does not and cannot relate to the two reasons set forth in the Order to Show Cause. In its opinion, the Eighth Circuit talked extensively about the CJA Act and the plan that was in effect in North Dakota, a plan approved by the Eighth Circuit many years before and concluded that there were problems with that plan. The court stated:

*Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan. However, his conditional agreement to serve in the future, if other attorneys who are competent to try cases are included on the panel, also has considerable merit. Under the Criminal Justice Act, each district is required to submit for approval its plan for implementation of the CJA to the Judicial Council of the circuit. 18 U.S.C. § 3006(a). We therefore refer the study as to alleged insufficiency of participation of the bar in the panels of the CJA to the district courts and the Judicial Council. (J.A. 65-66) (emphasis added).*

The court thus recognized that the plan in effect at the time this matter arose was deficient and required study and revision.

Snyder, upon receipt of the opinion of the Eighth Circuit suspending him, prepared a petition for rehearing en banc (J.A. 70-82). The petition for rehearing was based on the following grounds:

1. There had been a denial of due process;
2. There had been a denial of First Amendment rights;
3. There was a failure by Judge Lay to disqualify himself pursuant to 28 U.S.C. § 455.

The petition contained as exhibits an affidavit of Monteith (J.A. 82-83), the recipient of the letter and an affidavit of Judge Van Sickle (J.A. 83-84). The petition further contained a resolution of Snyder's local Burleigh County Bar Association (J.A. 84-87). The affidavits of Monteith and Judge Van Sickle indicate that they were not bothered by the October 6th letter and the content of the resolution from the Bar Association outlines in part the insufficiency of the CJA plan in North Dakota and further points out Snyder's service in cases involving indigents.

The Eighth Circuit denied the petition for rehearing (J.A. 88-95). The opinion makes it clear that the reason for the suspension is the October 6th letter:

No apology for the October 6th letter was made. Thereafter on February 24, 1984, Chief Judge Lay wrote to Mr. Snyder giving him another opportunity to apologize. (J.A. 91).

The court stated that Judge Lay was not disqualified pursuant to 28 U.S.C. § 455 from serving on the panel

and summarily dealt with the due process allegation raised by Snyder stating:

It is abundantly clear from the record that Snyder had notice that his disrespectful letter could be a basis for discipline. Snyder was given at least three opportunities to apologize for the letter and declined to do so. (J.A. 93).

Nothing is said in the opinion about the fact that the Order to Show Cause had absolutely no mention of the letter of October 6th, and that the request for the apology which arose during the hearing before the court and followed in the exchange of letters between Snyder and Judge Lay, was not the basis of the Show Cause Order in the first instance. Therefore Snyder was denied due process.

In dealing with Snyder's First Amendment issues, the court again concluded that the October 6th letter was disrespectful and further concluded that disrespectful remarks do not fall within the ambit of protected speech. Again, the court makes it clear that the reason for the suspension is the content of the October 6th letter:

However, because of Snyder's past cooperation with the district court and serving on pro bono matters, because of his now professed willingness to continue to do so and to comply with the CJA guidelines, and because of the alleged misunderstanding as to the reasons for his suspension—we *conditionally vacate the panel's order of suspension and provide an additional ten days from the date of this letter for Attorney Snyder to provide a sincere letter of apology to this court for the disrespectful comments directed to the court in his letter of October 6, 1983, sent to Judge Van Sickle's secretary.* The clerk is directed that if Snyder fails to comply with this request our original order of suspension will be reinstated with the six months suspension to run from the date of the original order. (J.A. 94-95) (emphasis added).

It is clear from the court's opinion that the court recognized that Snyder had satisfied the issues raised in its Order to Show Cause and further it clearly enunciates the fact that the suspension was ordered because of Snyder's failure to apologize for the content of the October 6th letter.

### SUMMARY OF ARGUMENT

The first fundamental issue in this case is whether the Eighth Circuit denied Snyder his First Amendment right to free expression by suspending him from the practice of law in the federal courts in the Eighth Circuit because of the content of the October 6, 1983, letter to Monteith and his refusal to apologize for the content of that letter.

Snyder contends that the First Amendment provisions are applicable to attorneys and although the First Amendment rights are not absolute (*see e.g. Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 (1978)) they may not be curtailed unless there is a substantial countervailing interest. *In re R.M.J.*, 455 U.S. 191, 203-04 (1982).

It is Snyder's further contention that an appropriate standard for evaluating the content of the letter is the "clear and present danger standard". This Court has had occasion to address the issue of criticism of the judicial system and the judiciary in various cases involving citizens and the press including *Bridges v. California*, 314 U.S. 252, 268-72 (1941), *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) and others. Those cases generally hold that restrictions on criticism of the judicial system must be justified in terms of some substantive evil which they are designed to avert and that the interest protected by the regulation must be substantial. Snyder con-

tends that the proper application of the clear and present danger standard as set forth in *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978):

Requires the court to make its own inquiry into the imminence and magnitude of the dangers said to flow from the particular utterance and then balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression.

Snyder further contends that attorney criticism of the judicial system is an important and substantial right in that attorneys have special knowledge of the judicial system and are in a special position to use that knowledge to improve the system and correct its mistakes.

The Eighth Circuit has attempted to apply a standard which prohibits all "disrespectful" comments and as such the standard is an unconstitutional restriction of an attorney's right to free speech.

Snyder further contends that the comments in the October 6th letter do not in any way threaten the administration of justice and certainly do not constitute an obstruction of justice. Attorney misconduct constituting an obstruction of justice must consist of fraudulent, intentional, and improper motive misconduct and such conduct must be shown or sustained by clear and convincing proof.

The letter that is the basis for the suspension was a private letter directed to a secretary to a federal judge and the letter was not released to the media and did not become public until the Eighth Circuit issued its Order to Show Cause. It is important to note the functions being per-

formed which Snyder was critical of were administrative functions, not judicial functions, and a more strict standard regarding entitlement to free speech must be employed in situations where the remarks involved do not involve a pending judicial action.

The Eighth Circuit has relied upon Rule 46, Fed.R. App.P., as a basis for administering this discipline. Snyder contends that the provisions of Rule 46 are unconstitutionally overbroad and vague as applied to the facts of this case.

The second fundamental issue in this case is denial to Snyder of due process. Snyder has been denied due process in presenting his fundamental First Amendment rights in this case. The Order to Show Cause issued by the Eighth Circuit did not mention the October 6th letter, thus Snyder did not raise any First Amendment rights or arguments in his return to the Order to Show Cause and only after the hearing commenced before the Eighth Circuit panel did the content of the October 6th letter become an issue. He has thus not been afforded:

1. Proper notice of the reasons for the proposed suspension from practice;
2. An opportunity to be heard on the specific charge that his letter was disrespectful, and that its contents would justify suspension of his privileges to practice law; and
3. There was no hearing afforded or provided with respect to the assertion that the October 6, 1983, letter would be a basis for suspension of his privileges to practice.

Accordingly, Snyder's position is that the action taken by the Eighth Circuit is in violation of his First Amend-

ment rights and that the method which the Eighth Circuit used in suspending him from practice denied him due process.

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## ARGUMENT

### I. The Suspension Of Petitioner By The Eighth Circuit Court Of Appeals Constitutes A Denial Of His First Amendment Right To Free Expression.

Snyder was suspended from the practice of law in the federal courts by the Eighth Circuit because he refused to retract statements made in a letter dated October 6, 1983, to the secretary of Judge Van Sickle. The Eighth Circuit deemed Snyder's remarks to be disrespectful to the Court. *In re Snyder*, 734 F.2d 334, 337, 343 (8th Cir. 1984) (J.A. 61-93). The substance of Snyder's letter reflected his frustration with the paperwork compliance required to receive reimbursement for services rendered pursuant to the Criminal Justice Act, 18 U.S.C. §3006A (1982). It is clear that Snyder was not suspended for his refusal to continue to serve on the Criminal Justice Act Panel.<sup>1</sup> It is equally clear that he was not suspended for his failure to forward the proper support for his request for fees. That failure was properly resolved by the Court in its refusal to pay him for the unsubstantiated and undocumented amounts.<sup>2</sup> Snyder was suspended because of the

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1. *Snyder*, 734 F.2d at 339 (J.A. 65). Judge Lay, in the decision of the three judge panel, recognized that certain of Snyder's criticism had merit. *Snyder*, at 339 (J.A. 64-65).

2. *Id.* at 336 n.3 (J.A. 57).

"disrespectful" nature of his remarks and because of his refusal to apologize for them.<sup>3</sup> This case involves pure speech.

While the sanction imposed upon Snyder is unambiguous, the Eighth Circuit's rationale for that sanction is not readily apparent. Certainly the Eighth Circuit was offended by the remarks contained in the letter. The offense taken by the court was compounded by Snyder's refusal to apologize. While that may explain the sanction, it cannot justify it. The Eighth Circuit appears to believe that an attorney's refusal to publicly display respect for the court as a "legal institution" threatens the very survival of the rule of law. *Snyder*, at 337 (J.A. 60). Those attorneys who make "disrespectful" statements about the judicial branch of government demonstrate that they are "not presently fit to practice law in the federal courts." *Id.* (J.A. 60). In the Court's view, "[i]t is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech." *Id.* at 343 (J.A. 93).

Such a view not only does not comport with the standards previously enunciated by this Court, but is also directly contrary to an unbroken line of cases holding that a restriction on a citizen's right to free expression can survive only when such expression presents a "clear and present danger" of the imminent occurrence of some substantive evil within the power of government to prevent.

3. See Letter from Judge Lay to Snyder (Feb. 24, 1984) (J.A. 52-53); *Snyder*, 734 F.2d 334, 337, 342 (8th Cir. 1984) (J.A. 59, 91-92).

The Court also refers to Fed. R. App. P. 46(c).<sup>4</sup> In support of the Rule 46 sanction, the court refers to DR 1-102(A) (5) of the Model Code of Professional Responsibility, which prohibits attorneys from engaging in conduct which is "prejudicial to the administration of justice." *Id.* However, the Eighth Circuit has not indicated that it has adopted the provisions of the Model Code of Professional Responsibility as a limiting factor to Rule 46. More importantly, the court does not explain how Snyder's letter or his refusal to apologize are "prejudicial to the administration of justice."

#### **A. The First Amendment is Applicable to Attorneys.**

Lawyers have been provided First Amendment protection in several contexts. In 1963, this Court invalidated a Virginia anti-solicitation law, holding that the activities of the N.A.A.C.P. "are modes of expression and association protected by the First and Fourteenth Amendments which Virginia may not prohibit, under its power to regulate the legal profession . . . ." *N.A.A.C.P. v. Button*, 371 U.S. 415, 428-29 (1963). In *Bates v. State Bar*, 433 U.S. 350, 379 (1977), it was held that lawyer advertising is a form of commercial speech protected by the First Amendment. See also *In re R.M.J.*, 455 U.S. 191 (1982). It is therefore clear that lawyers are protected by the First Amendment, and that professional

4. Rule 46(c) provides: "Disciplinary Power of the Court Over Attorneys. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar or for failure to comply with these rules or any rule of the court."

rules of ethical conduct are subject to constitutional constraints.

Although an attorney's First Amendment rights are not absolute (*e.g.*, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 462 (1978)),<sup>5</sup> those rights may not be curtailed unless there is a substantial countervailing interest. *R.M.J.*, 455 U.S. at 203, citing, *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557, 563-64 (1980). This framework has been developed as a necessary compromise between the role of an attorney in our society and the important values supported and derived from the First Amendment.

**B. The "Clear and Present Danger Standard" is the Appropriate Test for Evaluating Petitioner's Remarks.**

The Supreme Court has had cause to address criticism by citizens and the press of both the judicial system and the judiciary on several occasions. *Bridges v. California*, 314 U.S. 252, 268-72 (1941); *Pennekamp v. State of Florida*, 328 U.S. 331, 346-50 (1946); *Craig v. Harney*, 331 U.S. 367, 373, 376 (1947); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). These cases hold restrictions on criticism of the judicial system or the judiciary must be justified "in terms of some serious substantive evil which they are designed to avert." *Bridges*, 314 U.S. at 270. The interest protected by the regulation must be substantial, *Button*, 371 U.S. at 444,<sup>6</sup> and freedom of

5. Cf. *Spevack v. Klein*, 385 U.S. 511, 514 (1967) (self-incrimination clause of the 5th amendment extends to lawyers even in disciplinary proceedings).

6. See also *Elrod v. Burns*, 427 U.S. 347, 362 (1976); quoting, *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

speech should not be impaired through a subsequent sanction "unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice." *Craig*, 331 U.S. at 373. It is therefore essential that the perceived threat is one of substance. "[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969); see also *Cohen v. California*, 403 U.S. 15, 23 (1971).

Originally the clear and present danger test focused exclusively on the evil to be avoided and the probability of that evil being brought about by the words used.<sup>7</sup> Over the years, the Supreme Court has modified the application of the "clear and present danger" test by allowing First Amendment interests to be balanced against other compelling governmental interests. This Court recently stated in *Landmark*, 435 U.S. 829 (1978), that the proper application of the clear and present danger test "requires a court to make its own inquiry into the imminence and magnitude of the danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Id.* at 842-43. The test in *Landmark* reconciles the views expressed by Justice Frankfurter in his dissents in *Bridges* and *Craig* with the concerns of the majority in those cases.

7. See *Schenck v. United States*, 249 U.S. 47, 52 (1918): The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

*Id.* at 52.

The *Landmark* balancing formulation of the clear and present danger standard should also be applied to attorney speech not involving a pending case, not creating an obstruction of justice, and not directly impugning the integrity of a judge exercising his judicial function. This standard has been applied to several aspects of attorney speech and speech related conduct that impinges on the First Amendment.<sup>8</sup> The same type of analysis should be applied to this case, especially since Snyder's remarks constitute pure speech (as opposed to commercial speech or speech plus conduct) and are the essence of political expression.<sup>9</sup>

Within the confines of the clear and present danger test, attorney criticism of the judicial system furthers an important and recognized public interest. Lawyers have a special knowledge of the judicial system and are in a special position to use that knowledge to improve the system and correct its mistakes.

Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criti-

8. See *Button*, 371 U.S. at 444 (activities fall within First Amendment protection; state failed to advance any substantial regulatory interest); *Bates*, 433 U.S. at 381 (Court not persuaded that the proffered reasons justify suppression of all attorney advertising); *In re Primus*, 436 U.S. 412, 436 (1978) (where First Amendment implicated, a very distant possibility of harm cannot justify proscription of the activity); *Ohralik*, 436 U.S. at 459 (while entitled to some constitutional protection, in-person solicitation is subject to regulation due to the particularly strong state interests); *R.M.J.*, 455 U.S. at 203 (the state must assert a substantial interest and the interference with attorney speech must be in proportion to the interest served).

9. An attorney's critique of the judicial system or a court is conduct that implicates interests of free expression. Cf. *Primus*, 436 U.S. at 426, 426-32. In the context of political expression, a governing body or court must regulate with significantly greater precision. *Id.* at 437-38.

cism. Indeed, they are under a special responsibility to exercise fearlessness in doing so.

*In re Sawyer*, 360 U.S. 622, 669 (1959) (Frankfurter, J., dissenting); see also Model Code of Professional Responsibility EC 8-1 (1983).

"[S]peech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

*Bridges*, 314 U.S. at 270-71 (footnote deleted). "[T]he law gives '[j]udges as persons, or courts as institutions . . . no greater immunity from criticism than other persons or institutions.'" *Landmark*, 435 U.S. at 839 citing, *Bridges v. California*, 314 U.S. 252, 289 (1941) (Frankfurter, J., dissenting). "[J]udges are supposed to be [persons] of fortitude, able to thrive in a hardy climate." *Craig*, 331 U.S. at 376. A private citizen does not and must not surrender the right to freedom of expression when he or she becomes a licensed attorney. See *Sawyer*, 360 U.S. 622 (1959); *Polk v. State Bar*, 374 F. Supp. 784, 788 (N.D. Tex. 1974).

### C. The Standard Applied by the Eighth Circuit to Petitioner's Remarks is Inconsistent with the First Amendment.

The Eighth Circuit's creation of a standard prohibiting all disrespectful remarks by an attorney has no sup-

port in the law; nor should it be given any. As formulated, the Eighth Circuit standard unnecessarily restricts attorneys' protected speech, both directly and indirectly. The lower court failed to apply the clear and present danger test and it substituted no comparable criteria. It failed to particularize the evil to be avoided and it delineated no feature of public interest to be served. Mere disrespect towards the judicial system or a court does not, in and of itself, constitute a substantial evil worthy of total prohibition.<sup>10</sup> More importantly, an absolute prohibition of all disrespectful remarks would create a chilling effect upon attorneys because of the inherent vagueness of the term "disrespectful."<sup>11</sup> The threat of punishment breeds fear, and fear engenders self-censorship. *Cf. Schaefer v. United States*, 251 U.S. 466, 493-94 (1920) (Brandeis, J., dissenting).

In order to give substance to the Eighth Circuit standard, it is necessary for the court to find that disrespectful speech by a lawyer—in all possible circumstances—is so abhorrent as to warrant no protection from the First Amendment. Such a finding totally negates the recognized value of attorney criticism of the system and the "special

10. Petitioner sincerely believes that his comments were not disrespectful. Judge Van Sickle, who forwarded Snyder's letter to Judge Lay, also did not consider the letter to be disrespectful. See Rieger, *Lawyer's Criticism of Judges: Is Freedom of Speech a Figure of Speech*, 2 Const. Commentary 69, 71 n.6 (1985). See *infra*, Part II.

11. See *infra*, Part II.

responsibility" that lawyers have "to exercise fearlessness in doing so."<sup>12</sup>

According to the Eighth Circuit, the evil to be prevented is nothing less than the collapse of the legal system itself:

[Snyder's] refusal to show continuing respect for the court and his refusal to demonstrate a sincere retraction of his admittedly "harsh" statements are sufficient to demonstrate to this court that he is not presently fit to practice law in the federal courts. All courts depend upon the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive.

*Snyder*, 734 F.2d at 337 (footnote omitted) (J.A. 60). This extreme view has been repeatedly rejected by this Court. See, e.g., *Bridges*; *Landmark*. Surely our system of law is not so fragile that it cannot withstand occasional disrespectful remarks that may be advanced by attorneys.

The belief that allowing attorneys to make disrespectful remarks will cause the downfall of our system of justice is nothing more than an "undifferentiated fear" which does not even rise to the level of "a very distant possibility of harm." *Cf. Primus*, 436 U.S. at 436 ("A 'very distant possibility of harm' . . . cannot justify proscription of the activity of [the attorney] revealed by this record.").

12. *Sawyer*, 360 U.S. at 669 (Frankfurter, J., dissenting). This does not mean that petitioner takes the opposite extreme and advocates that all forms of disrespectful remarks made by a lawyer should be protected by the First Amendment. As discussed, *infra*, petitioner does not assert that conduct which is directed at a pending case and which tends to inhibit the fair and impartial administration of justice or conduct which actually obstructs justice should receive First Amendment protection.

Neither is the Eighth Circuit's view on the scope of First Amendment rights of attorneys supported by this Court's opinion in *Sawyer*, 360 U.S. 622 (1959). The Circuit cites *Sawyer* at 646-47 (Stewart, J., concurring) for the proposition that "[i]t is well settled that disrespectful remarks by an officer of the court do not fall within the ambit of protected speech." *Snyder*, 734 F.2d at 343 (J.A. 93). This is both a misstatement of the law and a misreading of *Sawyer*.

The term "officer of the court" does not have a literal meaning. *Cammer v. United States*, 350 U.S. 399, 405 (1956). A license to practice law does not turn a citizen into a vassal. The bar must be fearless and independent, not obsequious. This court has expressed its concern that the bar be independent, "that lawyers be unintimidated—free to think, speak, and act as members of an Independent Bar." *Konigsberg v. State Bar*, 353 U.S. 252, 273 (1957) (footnote deleted).

It is not "well settled" that disrespectful remarks by an attorney fall outside the protections of the First Amendment. This Court has had only one opportunity to address this issue. In the *Sawyer* decision, this Court explicitly declined to reach the First Amendment issue. *Sawyer*, 360 U.S. at 626-27. Instead, the Court held that the suspension of the lawyer for making comments to a public audience concerning a pending trial and the state of the law did not constitute an obstruction of justice and was not supported by the evidence. *Id.* at 635-36.

Contrary to the assertions made by the Eighth Circuit, *Sawyer* does not support the view that all disrespectful comments by attorneys fall outside "the ambit of protected speech." Certainly some judges would construe *Sawyer's* comments as disrespectful. And yet the

*Sawyer* Court, "against a backdrop of the claimed constitutional rights of an attorney to speak as freely as another citizen," refused to allow the suspension to stand. *Id.* at 640. Thus *Sawyer* may be read as supporting the converse of the Eighth Circuit's assertion: *An absolute prohibition of all disrespectful remarks by an attorney cannot stand First Amendment scrutiny.*

In support of its construction of *Sawyer*, the Eighth Circuit quotes one sentence of Justice Stewart's concurrence: "Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech." (J.A. 93). On the surface—indeed, taken out of context—this statement seems to lend support to the Eighth Circuit's absolutist standard. It is necessary to place the statement in its original context to prevent misreading and misapplication:

Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech. For example, I doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline.

In the present case, if it had been charged or if it had been found that the petitioner attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial, this would be the kind of case to which the language of the dissenting opinion seems largely directed. But that was not the charge here, and it is not the ground upon which the petitioner has been disciplined.

*Sawyer*, 360 U.S. at 646-47 (footnote omitted). Taken in context, it is clear that Justice Stewart was concerned with the prospect of developing an absolute rule that supported all attorney speech. He was rightfully concerned that the

First Amendment should not be used to foster—or protect—release by an attorney of confidential information. Nor did Justice Stewart believe that the First Amendment should be used to prevent discipline of an attorney who “attempted to obstruct or prejudice the due administration of justice by interfering with a fair trial.”

Given these particulars, and given the weighty countervailing interests of the attorney-client relationship and the constitutional right to a fair trial, Justice Stewart was merely stating his unwillingness to extend the protections of the First Amendment to an attorney for “proven unethical conduct.” See *id.* at 646. Obviously Justice Stewart did not believe that Sawyer’s remarks rose to a level of proven unethical conduct, or he would not have concurred in the result. Nor is there any indication in his concurrence that disrespectful comments “do not fall within the ambit of protected speech.”

Not only does Justice Stewart’s concurrence fail to support the Eighth Circuit’s absolute prohibition of “disrespectful remarks,” but there is an even stronger likelihood that the Justices who dissented in *Sawyer* would not approve of the Eighth Circuit’s reasoning.

Justice Frankfurter’s dissent is grounded on the fact that Sawyer’s comments related to a pending trial in which she was actively participating, that the comments threatened the fair and impartial administration of justice, and impugned the integrity of the presiding judge. Especially telling is Justice Frankfurter’s remark concerning an attorney’s right to critique the courts and their administration of justice: “Of course, a lawyer is a person and he too has a constitutional freedom of utterance and may exercise

it to castigate courts and their administration of justice.” *Id.* at 666.<sup>13</sup> Justice Frankfurter was concerned that a proper balance be struck between what he viewed as important First Amendment freedoms and the even more important constitutional right of a citizen to the fair, impartial, and uninfluenced administration of justice. Cf. *Pennekamp*, 328 U.S. at 353 (Frankfurter, J., concurring). These concerns with the balancing of constitutional interests were given majority expression in *Landmark*. Thus even the Justices who dissented in *Sawyer* would reject the absolute rule that “disrespectful remarks by an officer of the court do not fall within the ambit of protected speech.”<sup>14</sup>

**D. Petitioner’s Comments Do Not Threaten The Administration of Justice and Do Not Constitute an Obstruction of Justice.**

A lawyer’s criticism of the judicial system or the judiciary cannot be grounds for disciplinary action where the criticism does not involve a pending action in which the attorney is a participant or does not directly impugn the integrity of a particular court or judge acting in a

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13. The same thought was reiterated at a later point in Justice Frankfurter’s dissent:

Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so.

*Sawyer*, 360 U.S. at 669.

14. Snyder’s remarks should also deserve protection through the plain application of *Sawyer*. Unlike *Sawyer*, Snyder’s remarks do not involve a pending action and do not, even indirectly, impugn the integrity of the Eighth Circuit or Chief Judge Lay. And when one compares Sawyer’s vituperative comments with Snyder’s, it is clear that Snyder’s remarks are more worthy of protection than those made by Sawyer.

judicial capacity, unless the remarks actually obstruct justice or create a clear and present danger to the administration of justice. Whether or not sufficient circumstances exist to restrict speech depends upon the specific facts of each case. *Landmark*, 435 U.S. at 842-44.

Several factors should be considered in the determination of whether there exists a clear and present danger to the administration of justice. When was the statement made? Was the statement directed at a pending judicial proceeding? Did the statement impugn the integrity of a judge's conduct of a pending judicial proceeding, or was the statement intended to intimidate the judge in the performance of his judicial function? Was the attorney making the statement directly involved in the proceeding about which the comment was made? Was the statement publicized? Did the statement contain obscene or otherwise patently offensive language? Did the statement impact the interests of any litigant? How vulnerable to outside interference or prejudice was the proceeding at which the statement was directed?<sup>15</sup>

Attorney misconduct which constitutes an obstruction of justice "must be sustained by clear and convincing proof, the misconduct must be fraudulent, intentional, and

15. In *In re Hinds*, 90 N.J. 604, 622-23, 449 A.2d 483, 493 (1982), the New Jersey Supreme Court utilized similar factors in assessing the standard for imposing discipline on an attorney for public statements made about a pending criminal case and the presiding judge in that case. The *Hinds* court authorized the use of the "reasonable likelihood" standard in applying the doctrine of clear and present danger to public statements made in an ongoing criminal trial. However, the court clearly indicated its preference for the clear and present danger standard as enunciated in *Landmark*, when examining conduct sought to be restricted by DR 1-102(A)(5) of the Code of Professional Responsibility. *Hinds*, 90 N.J. at 631-34, 449 A.2d at 497-99.

the result of improper motives." *In re Ryder*, 263 F. Supp. 360, 361 (E.D. Va.) *aff'd*, 381 F.2d 713 (4th Cir. 1967), *citing*, *In re Fisher*, 179 F.2d 361, 369 (7th Cir.), *cert. denied sub nom. Kerner v. Fisher*, 340 U.S. 825 (1950).<sup>16</sup> The fact of obstruction must "clearly be shown." *In re McConnell*, 370 U.S. 230, 234 (1962). In order to find an obstruction of justice the attorney's conduct must be "sufficiently disruptive" of the court's business, and must "in some way create an obstruction which blocks the judge in the performance of his judicial duty." *Id.* at 235-36. As was stated in *In re Dellinger*, 461 F.2d 389, 400 (7th Cir. 1972),

Mere disrespect or insult cannot be punished where it does not involve an actual and material obstruction. This is particularly true with respect to attorneys where the "heat of a courtroom debate" may prompt statements which are ill-considered and might later be regretted. [Cite.] Substantial freedom of expression should be tolerated in this area since "[j]udges are supposed to be men of fortitude, able to thrive in a hardy climate." *Craig v. Harney*, 331 U.S. 367, 376 [1947]. However, . . . , although it is elusive, there is a line beyond which disrespect becomes obstruction. When the remarks create an imminent prejudice to a fair and dispassionate proceeding, that line has been crossed.

As demonstrated by *Dellinger*, the test for disrespectfulness in the realm of pending actions is a strict one; an even

16. Moreover, the courts have the long-standing duty to foster the rights and independence of the bar by a careful exercise of their power to sanction attorneys:

The power [to remove an attorney] is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility; but it is the duty of the court to exercise and regulate it by a sound and just judicial discretion, whereby the rights and independence of the bar may be as scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.

*Ex parte Secombe*, 60 U.S. (19 How.) 9, 13 (1856).

stricter standard should be employed in situations where the remarks do not involve a pending action<sup>17</sup> or impugn the integrity of a judge.

Neither Snyder's remarks nor his refusal to apologize for them justify his suspension. His remarks constitute speech deserving of constitutional protection.

The letter that is used as the basis for Snyder's suspension consists of five paragraphs. The first paragraph serves as an introduction, the last as a closing. In the second paragraph, Snyder states that he is "appalled by the amount of money which the federal court pays for indigent criminal work." (J.A. 14). In the third paragraph, Snyder states that:

not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it. (J.A. 14-15).

In the fourth paragraph, Snyder states that he is "extremely disgusted by the treatment of the Eighth Circuit. . . ." (J.A. 15).

Snyder's comments do not concern a pending case. Nor do they impugn the integrity of the Eighth Circuit or

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17. As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer*, 360 U.S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings.

*Nebraska Press Association v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring); see also *Sheppard v. Maxwell*, 384 U.S. 333, 361 (1966); *United States v. Tijerina*, 412 F.2d 661, 667 (10th Cir.), cert. denied, 396 U.S. 990 (1969).

any of its judges. Certainly no judge able to thrive in a hardy climate would be intimidated by Snyder's remarks. Snyder's remarks were not directed to a court acting in a judicial capacity;<sup>18</sup> rather, his letter is more properly viewed as intra-institutional criticism of the ministerial provisions of the Criminal Justice Act. Further, Snyder's comments followed two earlier efforts to provide requested documentation. Finally, his letter was a private communication and only became public after the Eighth Circuit issued its Order to Show Cause.<sup>19</sup> It was not made in an open forum and no attempt was made to hold the court system open to ridicule. Thus, examining the circumstances of this case, it is clear that Snyder's comments did not and do not create a clear and present danger to the administration of justice.

Nor do Snyder's remarks in any way obstruct the administration of justice. The Criminal Justice Act was administered to its inexorable conclusion notwithstanding Snyder's venting of his frustration. His failure to comply with the Act's guidelines as to the breakdown of his hours and the submission of supporting material with his bill was resolved by the court's denial of excess attorney fees and unitemized expenses. The administration of justice was not obstructed.

Snyder's remarks, even if harsh, concern a substantive evaluation of the Criminal Justice Act; its former

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18. See *Stump v. Sparkman*, 435 U.S. 349, 362 (1978); *Ex parte Virginia*, 100 U.S. 339, 348 (1879).

19. Except for the Eighth Circuit's unfortunate overreaction, no one outside of the court would have known about the letter. Furthermore, even if Snyder had published his letter on the front page of the *New York Times*, no imminent threat to the administration of justice would have existed.

Rieger, *supra* note 10 at 87.

standard of pay; the financial difficulty the Act imposes upon attorneys; the administrative burden it imposes; and the manner in which the Eighth Circuit administered the Act. The words may be curt, but they are not offensive or disrespectful. See Rieger, *supra* note 10, at 71 n. 6.

Snyder's remarks concern an important public issue. As such, the letter is "more than self-expression; it is the essence of self-government." *Garrison*, 379 U.S. at 75. If words such as these do not find constitutional protection, the chilling effect upon attorneys will be both broad and deep.<sup>20</sup> Attorney's opinions will be only as safe as the sensitive nature of any given judge on any given day.

## II. Rule 46, As Applied To Prohibit An Attorney's "Disrespectful" Remarks, Is Unconstitutionally Overbroad and Vague.

Rule 46, Fed. R. App. P. has survived constitutional attack on grounds of overbreadth and vagueness in the lower courts by an informal incorporation of provisions of the Model Code of Professional Responsibility. See *In re Bithoney*, 486 F.2d 319, 323-25 (1st Cir. 1973); *United States v. Hearst*, 638 F.2d 1190, 1197 (9th Cir. 1980), *cert. denied*, 451 U.S. 938 (1981); see also *Halleck v. Berliner*, 427 F.Supp. 1225, 1239-40 (D.D.C. 1977). In the present case the Eighth Circuit has apparently chosen to infuse the substance of DR 1-102 (A) (5) into Rule 46(c), Fed. R.

20. For an overview of other instances of attorney discipline for comments directed at the judicial system or the judiciary, see Rieger, *supra* note 10, at 69-70.

App. P. However, as applied to the facts of this case, Rule 46(c) is unconstitutionally overbroad and vague.<sup>21</sup>

In *Procunier v. Martinez*, 416 U.S. 396 (1974), this Court established a two-part test to determine when restrictions on First Amendment freedoms were warranted:

First, the regulation . . . must further an important or substantial governmental interest unrelated to the suppression of the expression . . . second, the limitation of First Amendment freedoms must be no greater than is necessary or essential to the protection of the particular governmental interest involved.

*Id.* at 413; see also *United States v. Grace*, 461 U.S. 171, 177 (1983); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212 (1975). Where a court seeks to limit an attorney's First Amendment rights, sanctions issued pursuant to Rule 46(c) must be limited to instances involving substantial countervailing interest, such as conduct which results in a serious detriment to a client (e.g. release of confidential information), conduct with a substantial likelihood of producing future harm to clients (e.g. fraud or misrepresentation), or conduct actually amounting to an obstruction of justice (e.g. statements which prevent a fair trial).

Rule 46(c) fails to provide an attorney with sufficient information as to what otherwise constitutionally protected conduct could result in disciplinary action. The Rule provides "an insufficient nexus with any of the public interests that may be thought to undergird [it]."

21. While it may be appropriate for the Court to declare Rule 46 void on its face on grounds of vagueness or overbreadth, or to merely declare Snyder's remarks as protected by the First Amendment, and while such a decision would benefit petitioner personally, petitioner urges the Court to establish guidelines for attorney speech by applying the clear and present danger standard, or, in the alternative, limiting Rule 46 by a narrow construction. Given the present state of the law, guidance to the lower federal courts and state courts is clearly necessary. See Rieger, *supra* note 10, at 69-70.

*Grace*, 461 U.S. at 181. Certainly it contains no ascertainable standard by which an attorney may determine in advance if his or her speech will subject him or her to disciplinary sanctions. *Cf. Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971); *Hynes v. Mayor & Council of the Borough of Oradell*, 425 U.S. 610, 620-22 (1976). The standard of "disrespectful" has no content. The values it imparts are largely subjective and inevitably vary with the personality of the listener, *cf. Thomas v. Collins*, 323 U.S. 516, 534, 535 (1945), thus negating the possibility of "even-handed discipline" of attorneys. *Sawyer*, 360 U.S. at 646 (Stewart, J., concurring).<sup>22</sup>

More importantly, the type of conduct prohibited by the Eighth Circuit standard does not fall within the core concerns of Rule 46. *Cf. Parker v. Levy*, 417 U.S. 733, 754-55 (1974). The phrase "conduct unbecoming an officer of the court" certainly brings within its confines illegal conduct, misrepresentations, serious detriment to a client, and release of confidential information, to name but a few. It is not so clear, however, that the rule was intended to include all alleged disrespectful remarks made by an attorney.

Unlike Article 133 of the Uniform Code of Military Justice, Rule 46 does not directly relate to a system of rules or any limiting constructions. *Cf. Parker*, 417 U.S. at 752-54. Nor is Snyder's conduct "clearly prohibited" by the rule. *Cf. id.* at 755. Indeed, the Model Code of Professional Responsibility makes no mention and con-

22. As Justice Black stated in *Konigsberg*:

[W]e recognize the importance of leaving states free to select their own bars, but it is equally important that the state not exercise this power in an arbitrary or discriminatory manner nor in such a way as to impinge on the freedom of political expression or association.

*Konigsberg*, 353 U.S. at 273.

tains no prohibition of disrespectful comments directed to a judge or court.

As discussed in Part I. D., *supra*, Snyder's comments did not concern a pending case, did not constitute a detriment to a client, and did not obstruct justice. Rule 46(c) is overbroad as applied to this case because Snyder's alleged "disrespectful" comments are protected by the First Amendment due to the lack of a substantial countervailing interest. The rule is vague as applied because, to paraphrase Justice Harlan, one person's disrespectful comments are another person's lyric.<sup>23</sup>

### III. The Order To Show Cause Hearing Before The Eighth Circuit Court Of Appeals Violated Petitioner's Due Process Rights.

#### A. Petitioner Did Not Receive Notice That Remarks Made To Judicial Secretary Would Be Considered Contumacious Conduct Of Significant Character So As To Justify Suspension.

The invited comments of Snyder contained within his October 6, 1983, letter to a judicial secretary formulate the basis of the free speech issue heretofore presented. If one assumes the applicability of the First Amendment to the comments of Snyder, a more subtle question arises as to whether Snyder was given a reasonable opportunity to raise the issue and have the merits of the argument fairly weighed by the Eighth Circuit at the time of the hearing on the Order to Show Cause.

It is important to note that Snyder's frank comments on the administration of the Criminal Justice Act in North Dakota were the basis of suspension; however, they were never cited as a potential basis in the Order to Show Cause issued by Judge Lay.

23. *Cohen v. California*, 403 U.S. 15, 25 (1971).

The December 22, 1983, Order referred to (1) Snyder's request that his name be removed from the list of attorneys willing to represent indigents in criminal cases, and (2) his refusal "to comply with the guidelines and forms required by the Criminal Justice Act for payment of attorneys' fees." According to the Eighth Circuit, these two matters justified a show cause hearing to consider Snyder's suspension. (J.A. 21-23). The Order did not refer to any alleged contumacious comments by Snyder, nor did it suggest that the dignity of the court system had been threatened or scarred by Snyder's letter to the court secretary.

The only indication that Snyder was refusing to serve on the Criminal Justice Act panel came from language within his October 6, 1983, letter wherein he "instructed" the secretary to remove his name from the list of attorneys willing to accept criminal indigency work (J.A. 14-15). With respect to documentation of vouchers and applicable Criminal Justice Act guidelines in compiling and transmitting the documentation, Snyder indicated to the secretary that he would not submit further materials and suggested she could "take it or leave it."

The October 6, 1983, letter is the only document wherein Snyder commented on his willingness to serve and on the documentation requirements under the Criminal Justice Act plan. That part of the letter, although serving as the basis for the issuance of the Order to Show Cause, did not formulate the basis for suspension. Snyder was not directed to respond to an Order to Show Cause for suspension predicated on what is interpreted now as contumacious conduct in refusing to "offer a retraction and sincere apology for his disrespectful remarks." *Snyder*, 734 F.2d at 336 (J.A. 58).

In its decision of April 13, 1984, the panel of the Eighth Circuit cited the language which it apparently con-

sidered to be contumacious and which it used to suspend Snyder from practice:

Snyder then sent to the district judge's secretary a letter, dated October 6, "for the purpose of responding to" the chief judge's request. Snyder stated that he was "appalled" at the small amount paid to attorneys for indigent criminal defense work. He indicated his displeasure at the "extreme gymnastics" required to receive "puny amounts." He then stated to the court: "We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it." Snyder concluded his letter by stating that he was "extremely disgusted" by the treatment of him by the Eighth Circuit, that he wished to be taken off the list of attorneys willing to accept appointment in indigent cases, and that he had "simply had it."

*Snyder*, 734 F.2d at 336 (J.A. 56-57).

The Order to Show Cause did not cite or refer to this language as a basis for possible suspension. The Order did not suggest that Snyder should be prepared to respond to assertions that his language, which included phrases such as "puny amounts" and "extreme gymnastics," would be questioned. And it was not suggested in any way that "sincere apologies" had been requested and refused, thus forming an additional basis for the hearing on the Order to Show Cause.

The initial request for an apology from Snyder came not in some legal pleading directed to Snyder but in a letter from Judge Lay to Judge Van Sickle on November 15, 1983 (J.A. 18-19). Snyder was not a party to this correspondence and the letter could not be considered as notice to Snyder that in some future Order to Show Cause hearing the issue of refusal of an apology would result in suspension. Judge Lay's letter was drafted in his administrative capacity and did not cite specific language from

Snyder's letter which constituted a threat to the court so grievous so as to justify suspension. Judge Lay's letter suggested only the potential of issuing an Order to Show Cause and it was not meant to be nor could it be construed as notice of the defined reasons for possible suspension even if Snyder had received it (J.A. 18-19).

The Return to the Order to Show Cause (J.A. 23-31) did not address the issue of free speech which now forms the basis for this petition. To have done so would have been inappropriate in light of the specific language of the Order to Show Cause of December 22, 1983. The return instead concentrated on the fact that the Model Criminal Justice Act Plan, adopted in North Dakota and previously approved by the Eighth Circuit, did not mandate participation, a fact later recognized by the Eighth Circuit panel.

Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan. However, his conditional agreement to serve in the future, if other attorneys who are competent to try cases are included on the panel, also has considerable merit. Under the Criminal Justice Act each district is required to submit for approval its plan for implementation of the CJA to the Judicial Council of the Circuit. 18 U.S.C. § 3006A(a). We therefore refer the study as to alleged insufficiency of participation of the bar in the panels of the CJA to the district courts and the Judicial Council.

*Snyder*, 734 F.2d at 339 (J.A. 65-66).

The Circuit suspended Snyder from practice not because he refused to participate on a panel of lawyers willing to serve indigent defendants and not because he refused to properly fill out a CJA voucher. He was suspended because the panel found his alleged disrespectful statements "contumacious conduct" for which Snyder refused to apologize. *Snyder*, 734 F.2d at 337 (J.A. 61).

Snyder was never given proper notice, opportunity for hearing, or a proper hearing on the allegation that his letter was contumacious or impeded the administration of the Criminal Justice Act in the Eighth Circuit or that it would be a basis for suspension. Snyder has thus been denied due process of law by the Eighth Circuit.

In *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 314 (1950), this Court observed:

An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under the circumstances, to apprise interested parties of the pendency of the action and afford them opportunity to present their objections.

The notice must be of such a nature to reasonably convey the information (in this case the assertion that perceived disrespectful comments might rise to contumacious conduct justifying suspension) and must afford a reasonable time for a party to present his case and have the merits fairly judged. *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The Order to Show Cause was a disciplinary proceeding undertaken pursuant to Rule 46 of the Federal Rules of Appellate Procedure and with the express purpose of suspending a property right of a practicing attorney. As such, the due process clause of the Fifth Amendment was applicable to the hearing ordered by the Eighth Circuit. It required reasonable notice of the basis for depriving Snyder of his license to practice law in the federal courts.

Although this action dealt with a suspension from practice rather than a permanent disbarment, the rights involved in each proceeding are similar, if not identical. This Court has observed that disbarment designed to pro-

tect the public is a punishment or penalty imposed on the lawyer and the lawyer is accordingly entitled to procedural due process of law. *In Re Ruffalo*, 390 U.S. 544, 550 (1968). Fair notice of the charges is essential to the concept of due process. The purpose of the notice requirement is to apprise the affected individual and then permit adequate preparation for an impending hearing. *Memphis Light Gas & Water Division v. Craft*, 436 U.S. 1, 14 (1978).

The Order to Show Cause did not apprise Snyder of the eventual basis used to suspend him and as a result he could not and did not prepare a response to those allegations. The transcript of the hearing demonstrates the lack of preparation on the First Amendment issue and the understandable failure of Snyder to address the issue. The panel requested an apology for the "tone" of the letter during the February 1984 hearing never indicating to Snyder that suspension might well follow any refusal. Snyder twice pointed to the fact that an apology was not the reason he had been summoned before the court (J.A. 40-41).

At the hearing, Judge Lay stated precisely what it would take for Snyder to purge himself of the "concern of the Court."

[A]ll it is is a simple statement that you will take pro bono assignments of the federal courts and that you will comply with the guidelines if you are asked to do so.

(J.A. 45).

In making that statement, the Eighth Circuit seemed to recognize the language of the Order to Show Cause. Something happened, however, as the hearing progressed and the true reason for the suspension became apparent in Judge Lay's final statement.

Judge Lay: Just on the assumption that Mr. Snyder will exercise some judgment in this matter, and consult with you or someone like you. I want to make it clear to Mr. Snyder what it is the Court is allowing you ten days lapse here, a period for you to consider. One is, that, assuming there is a general requirement for all competent lawyers to do pro bono work, that you stand willing and ready to perform such work and will comply with the guidelines of the statute. *And secondly, to reconsider your position as Judge Arnold has requested concerning the tone of your letter of October 6.*

(J.A. 50) (Emphasis added). By the end of this hearing, the "tone" of the October 6 letter was now the issue, one which never was identified prior to that time.

The guarantees of due process call for a hearing appropriate to the nature of the case. *Mullane*, 339 U.S. at 313. Snyder was being asked to show cause why he should not be suspended from practice in the federal courts. He was entitled to know the reasons for the anticipated suspension and if it was to be the "tone" of his October 6, 1983, letter he was entitled to that notice.

Responding to a request for an apology during the hearing is not a reasonable opportunity to be heard on the issue of First Amendment rights. "The fundamental requirement of due process is the opportunity to be heard and it is an 'opportunity which must be granted at a meaningful time and in a meaningful manner.'" *Parratt v. Taylor*, 451 U.S. 527, 540 (1981), quoting, *Armstrong*, 380 U.S. at 552.

The February 1984 hearing was not set to secure an apology. Snyder did not anticipate that the hearing would encompass the First Amendment issue and he had no reason to anticipate the issue based on the Order to Show

Cause. The fundamental purpose of the due process clause is to allow "the aggrieved party the opportunity to present his case and have its merits fairly judged." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982).

The First Amendment issue was never presented by Snyder and he did not have a meaningful opportunity to present his case regarding that issue. The matter was not fairly judged on its merits and Snyder was denied due process of law.

**B. Petitioner Did Not Receive Impartiality From The Judicial Officer Who Both Questioned His Conduct And Who Headed The Panel Suspending Petitioner.**

It was correspondence between a district court's secretary and a Circuit Court secretary which prompted Judge Lay's question of November 3, 1983, as to whether Snyder was "worthy of practicing law in the federal courts in any matter." (J.A. 15-18). The opinion of Judge Lay regarding lawyer participation under the Criminal Justice Act was set out in detail in the same letter. It was clear Judge Lay disapproved of the position taken by Snyder. He specifically directed Snyder's name be stricken from the appointment list and suggested the further discipline of suspension from all appearances. It is not without irony that the Eighth Circuit ultimately concluded Snyder's request that his name be removed from the appointment list was proper. The plan in North Dakota was not mandatory.

Because Snyder is participating under a plan which is purely voluntary, his refusal to serve is in technical compliance with the plan.

*Snyder*, 734 F.2d at 339 (J.A. 65).

The inference of the November 3, 1983, letter was clear. Judge Lay had determined that Snyder deserved

to be suspended based solely on his request to have his name taken from the appointment rolls. Judge Lay prejudged the matter to the point of indicating what he thought was an appropriate penalty.

Judge Lay not only issued the Order to Show Cause under his signature, and after rejecting a request to recuse himself, he chaired the panel of the Eighth Circuit which heard the Order to Show Cause matter and drafted the opinion of the panel. *In re Snyder*, 734 F.2d 334 (8th Cir. 1984) (J.A. 55-69).<sup>24</sup>

Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *Schweiker v. McClure*, 456 U.S. 188 (1982); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). To perform its high function in the best way "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954). Judge Lay should have recused himself from consideration of this matter based upon the provisions of 28 U.S.C. § 455, which states in pertinent part as follows:

Disqualification of justice, judge or magistrate:

(a) Any justice, judge, . . . of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned.

24. Compare the procedure employed by the Eighth Circuit in acting both as accuser and trier of fact with *Office of Disciplinary Counsel v. Pileggi*, 570 F.2d 480, 481 (3d Cir. 1978), and *In re Chandler*, 450 F.2d 813, 814 (9th Cir. 1971), in which the Third and Ninth Circuits appointed independent special masters who conducted proceedings and made findings, which were then reviewed by the respective courts of appeals. See also *In re Grimes*, 364 F.2d 654, 655 (10th Cir. 1966), cert. denied, 385 U.S. 1035 (1967).

Rieger, *supra* note 10, at 74 n.16.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

The language of the statute is also a part of Canon 3C of the *Code of Judicial Conduct*, which states in pertinent part as follows:

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, included but not limited to instances where:

a. He has a personal bias or prejudice concerning a party, or personal knowledge of the disputed evidentiary facts concerning the proceeding;

The initial involvement of Judge Lay in this matter before the issuance of the Order to Show Cause falls within the provisions of 28 U.S.C. § 455 in that he had personal knowledge of the facts concerning the proceedings.

To practice the requisite detachment and to achieve sufficient objectivity no doubt demands of judges the habit of self-discipline and self-criticism, incertitude that one's own views are incontestable and alert tolerance towards views not shared. But these are precisely the presuppositions of our judicial process. They are precisely the qualities society has a right to expect from those entrusted with ultimate judicial power.

*Rochin v. California*, 342 U.S. 165, 171-72 (1952).

It is respectfully submitted that Snyder was denied due process of law as guaranteed by the United States Constitution when the Chief Judge sat on the panel after there had been a request for his recusal and after he had indicated in his letter that he questioned whether Snyder

was "worthy of practicing law in the federal courts on any matter."

## CONCLUSION

Upon all of the grounds urged herein, separately and together, the judgment of the lower court should be reversed and vacated.

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